

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NOAH'S ARK PROCESSORS, LLC D/B/A
WR RESERVE

and

UNITED FOOD AND COMMERCIAL
WORKERS LOCAL UNION NO. 293

Case 14-CA-255658

**RESPONDENT'S POST-HEARING
BRIEF**

Noah's Ark respectfully files this brief with the Honorable Robert A. Ringler, Administrative Law Judge ("ALJ"). This case is before the ALJ based upon a Complaint and Notice of Hearing alleging that Noah's Ark Processors, LLC d/b/a WR Reserve violated sections 8(1)(1) and (5) of the National Labor Relations Act. The issues in this matter were heard by the ALJ over the Zoom for Government platform on January 12, 2021, and are addressed below.

STATEMENT OF FACTS

1. On November 1, 2019, the United States District Court for the District of Nebraska ordered Noah's Ark Processors LLC ("Noah's Ark") to bargain in good faith with United Food and Commercial Workers Local Union No. 293 (the "Union") by sending a representative with bargaining authority to Noah's Ark's and the Union's (collectively, the "Parties") negotiations. Jt. Ex. 10, ¶ 4 [hereinafter referred to as the November 1st Order or Judge Gerrard's November 1st Order].

2. The November 1st Order also required Noah's Ark to provide the Union and the Acting Regional Director of Region 14 at least 4 dates during November 2019, 8 dates during December 2019, and 8 dates during January 2020 on which Noah's Ark's representatives were available to bargain for no less than 6 hours on each date, so that the parties could bargain for a

minimum of 24 hours per calendar month, until the Parties reached a complete collective-bargaining agreement or a good-faith impasse. Jt. Ex. 10, ¶ 4(a).

3. Importantly, the November 1st Order required Noah's Ark to provide the Acting Regional Director of Region 14 and the Union a status report of each bargaining session within 5 days, or on the next business day if the fifth day fell on weekend or a holiday. Jt. Ex. 10, ¶ 4(d).

4. The November 1st Order required Noah's Ark's status reports to include (1) the participants, (2) the start and stop times of bargaining, (3) a list of proposals exchanged between the Union and Noah's Ark, (4) a summary of what was discussed about each proposal, (5) a list of any tentative agreements reached, and (6) any information requests made during the bargaining session. Jt. Ex. 10, ¶ 4(d).

5. On November 6, 2019, Frederick Zarate ("Zarate"), attorney for the Union, agreed to Noah's Ark's proposed negotiation sessions on November 11th, 18th, 21st, and 26th; December 9th, 10th, 16th, and 17th; and January 13th, 14th, 27th, and 28th. Jt. Ex. 15, Email Chain Scheduling Bargaining for November, December, and January, at 1.

6. On November 19th, Jerry Pigsley ("Pigsley"), attorney for Noah's Ark, notified Zarate that Noah's Ark needed to change the start for the negotiations on November 21st and November 26th to 1:30 p.m. Jt. Ex. 16, Email Chain Regarding November 2020 Bargaining Part 1, at 6-7.

7. Zarate quickly inquired as to why Noah's Ark was requesting the starting times for the two last negotiations sessions in November be adjusted. Jt. Ex. 16, Email Chain Regarding November 2020 Bargaining Part 1, at 6.

8. Pigsley notified Zarate that a later start time would allow Noah's Ark to better tend to the needs of its business on those two days. Jt. Ex. 16, Email Chain Regarding November 2020 Bargaining Part 1, at 6.

9. Zarate refused to agree to Noah's Ark's request and asked Pigsley to specify exactly what business needs interfered with the scheduled start times for the Parties' last two scheduled negotiations in November. Jt. Ex. 16, Email Chain Regarding November 2020 Bargaining Part 1, at 5.

10. These early communications between the Parties' attorneys likely did nothing more than inflame the already-deteriorating relationship between the Parties.

11. Pigsley notified Zarate that Noah's Ark would hold to the agreed-upon start time of 9 a.m. for the last two negotiations in November, but notified that Noah's Ark would not agree to a start time earlier than 2 p.m. for future negotiations. Jt. Ex. 16, Email Chain Regarding November 2020 Bargaining Part 1, at 4.

12. Zarate immediately took exception to Pigsley's email and inferred that the Parties negotiating for three hours before and after 5 p.m. would be a violation of the duty to bargain in good faith. Jt. Ex. 16, Email Chain Regarding November 2020 Bargaining Part 1, at 4.

13. Pigsley responded by reminding Zarate that the Union had no objection to the two earlier November negotiations beginning at 1:30 p.m. Jt. Ex. 16, Email Chain Regarding November 2020 Bargaining Part 1, at 3.

14. While Zarate kept hammering home on the same question every email, what specifically required Noah's Ark to request the later start times for the two last November negotiations, Pigsley responded by once again asking Zarate whether the Union would agree to a later start time. Jt. Ex. 16, Email Chain Regarding November 2020 Bargaining Part 1, at 1-2.

15. Ultimately, Zarate failed to ever answer Pigsley's question, and it was unclear whether Zarate would have ever agreed to a later start time regardless of Noah's Ark's justification. Jt. Ex. 16, Email Chain Regarding November 2020 Bargaining Part 1, at 1.

16. This exchange was emblematic of the difficulty the Parties faced during negotiations, with the Union using Judge Gerrard's November 1st Order as both a sword with which to accuse Noah's Ark of continued bad faith bargaining and a shield to arguably prevent it from answering simple questions such as if a later start time for negotiations would be agreeable.

17. Noah's Ark and the Union ultimately agreed to cancel the November 21st negotiation, though Zarate's emails would lead one to believe otherwise. See Jt. Ex. 19, Email Chain from November 25, 2020, at 3-4.

18. Ron Morrison ("Morrison"), the Commissioner of the Federal Mediation and Conciliation Service, attended the Parties' negotiations on December 9th and 10th. Jt. Ex. 21, December 3, 2019, Email Chain with Mediator Regarding Bargaining Dates, at 1; Jt. Ex. 33, Stipulated Timeline, at 3.

19. In total, the Parties met seven times during the relevant bargaining period at issue after Judge Gerrard's November 1st Order, on November 11th, 18th, and 26th; December 9th, 10th, and 17th; and January 13th. Jt. Ex. 33, Stipulated Timeline, at 3-4.

20. Two negotiations were cancelled.

21. One on December 30, 2019, because the interstate from Lincoln, Nebraska to Grand Island, Nebraska was closed, making it impossible for Pigsley to travel to and attend the negotiation. Jt. Ex. 22, December 30, 2019 Email Regarding Cancellation of Bargaining Due to Interstate Closure, at 2.

22. The other on November 21, 2019, by agreement between the Union and Noah's Ark. Jt. Ex. 18, Email Chain Regarding November 2020 Bargaining Part 3, at 2.

23. The emails exchanged between the Parties show the Union, through its counsel, responding to simple requests to negotiate later in the day aggressively and with hostility. See generally Jt. Exs. 16-18.

24. The Union never gave a substantive answer as to why it was unamenable for it to bargain later in the day.

25. Additionally, and somewhat inexplicably, the Union posed no objection to the first two negotiations in November occurring in the afternoon and evening.

26. As part of the November 1st Order, Judge Gerrard ordered Noah's Ark to rescind all unilateral changes to the terms and conditions of employment for the bargaining unit employees that implemented pursuant to Noah's Ark's January 2019 Best and Final Proposal, while simultaneously requiring Noah's Ark not to revoke any wage increases. Jt. Ex. 10, ¶ 2.

27. On November 11, 2019, Noah's Ark presented its first proposal to the Union. Jt. Ex. 26, NAP Bargaining Summary for November 11, 2019, at 6.

28. On the same day, the Union submitted its first proposal to Noah's Ark. Jt. Ex. 26, NAP Bargaining Summary for November 11, 2019, at 8.

29. Predictably, the Union proposed to add several provisions to the bargaining agreement while Noah's Ark sought to remove or limit several provisions. Noah's Ark. Jt. Ex. 26, NAP Bargaining Summary for November 11, 2019, at 6-18.

30. Noah's Ark's proposal had 18 separate provisions, while the Union's had 32. Noah's Ark. Jt. Ex. 26, NAP Bargaining Summary for November 11, 2019, at 6-18.

31. Noah's Ark proposed removing maintenance employees and shag drivers from the bargaining unit; adding a provision that would allow bargaining unit employees to contact Noah's Ark's HR Department to withdraw from the Union and cease having Union dues withheld from their pay; removing steps two through four from Article 4's arbitration provisions; removing "glassed-in" from the bulletin board provision; deleting Article 6; deleting Article 7; Deleting the language in Article 8 after 3 years – Additional 2 days; deleting the language after the list of six holidays in Article 9; deleting Article 10; deleting Article 12 while keeping bargaining unit employees' rates of pay the same and allowing Noah's Ark to increase employees' pay without Union agreement; deleting Article 13 and not opposing Noah's Ark' ability to subcontract its existing operations; deleting Article 14 and not opposing Noah's Ark's right to assign extra work opportunities; deleting Article 17; deleting section 6 of Article 20 pertaining to Union Leave; deleting Article 21 regarding Plant Visitation and giving Noah's Ark the right to allow Union officers and representatives to visit locations designated by Noah's Ark's management; deleting Article 23, allowing the management to assign work in excess of 12 hours per day; deleting Article 24; and keeping Articles 3, 11, 15, 16, 18, 19, and 22 from the prior bargaining agreement the same. Noah's Ark. Jt. Ex. 26, NAP Bargaining Summary for November 11, 2019, at 6-7.

32. The Union's proposals included requiring Noah's Ark to provide the Union a complete list of each member of the Union; their identification numbers, social security numbers, or some other unique identifier for them; and the amount the members' weekly pay on a weekly basis; to stop Noah's Ark's Safety Council from being able to hear safety or health complaints of employees and given a reasonable period to correct any such problems before reporting said complaint to a government agency; allowing employees to refuse to perform any tasks they identified as containing unsafe conditions or equipment until such situations were corrected;

substantially increasing employees' allotted vacation time; adding employees' birthdays to the list of company holidays; adding 2 floating holidays to Noah's Ark's holiday list; giving employees another half-hour of holiday pay; providing that holiday hours worked but not paid would be considered hours worked for purposes of calculating overtime compensation; substantially increasing employee pay for holiday hours worked; increasing the number of employees eligible to receive premium pay for Sunday and holiday work; increasing the minimum required amount of work or equivalent pay for employees from two to four hours when they are called to work; changing the bargaining agreement's defined workweek; deleting the previous nondiscrimination language and replacing it with a new provision; cutting employees' probationary period in half from sixty to thirty days; lengthening the time period for which vacant positions must remain posted; increasing employees' pay when they successfully bid for a vacancy but are not immediately moved into the position they successfully bid for; paying employees for all fifteen minute breaks; increasing funeral leave pay by half an hour; making it so that the agreement would automatically extend instead of solely being for a set term and requiring sixty days' notice in order for the automatic extension not to apply; establishing a 401(k) for employees that would include a company matching provision; requiring new hire lists to be given to the Union by the end of business Monday on the week of orientation classes and termination lists to be given to the Union by the end of business on Monday of each week, and seniority lists on a monthly basis; adding in provisions regarding the voluntary and mandatory filling of temporary vacancies; guaranteeing full-time employees 36 hours of straight time pay each week; and allowing the Union to perform time studies at the plant with advance notice to the General Manager or his or his designee. Noah's Ark. Jt. Ex. 26, NAP Bargaining Summary for November 11, 2019, at 8-18.

33. During the Parties' first negotiation session, Noah's Ark withdrew its fourth proposal, regarding adding "glassed-in" to Article 5 regarding the bulletin board, and tentatively agreed to Union proposals 18 and 19, removing the old nondiscrimination language with an updated provision, during the November 11th bargaining session. Noah's Ark. Jt. Ex. 26, NAP Bargaining Summary for November 11, 2019, at 2.

34. Importantly, the Grievance Procedure, Article 4, came up during this bargaining session. Noah's Ark. Jt. Ex. 26, NAP Bargaining Summary for November 11, 2019, at 2.

35. Noah's Ark offered to modify its third proposal, adding back Step 2 to the Grievance Procedure. Noah's Ark. Jt. Ex. 26, NAP Bargaining Summary for November 11, 2019, at 2.

36. The Union counteroffered by proposing to eliminate the old four-step Grievance Procedure and replace it with a new Grievance Procedure totaling 10 sections. Noah's Ark. Jt. Ex. 26, NAP Bargaining Summary for November 11, 2019, at 2, 19-20.

37. This was all the progress that was made during the first bargaining session after Judge Gerrard's November 1st Order, where Noah's Ark withdrew 1 of its 18 proposals and tentatively agreed to 2 of the Union's 32 proposals. Noah's Ark. Jt. Ex. 26, NAP Bargaining Summary for November 11, 2019, at 2.

38. The Union, notably, did not tentatively agree to any of Noah's Ark's proposals during the first bargaining session. Noah's Ark. Jt. Ex. 26, NAP Bargaining Summary for November 11, 2019, at 2.

39. During the second bargaining session after Judge Gerrard's November 1st Order, on November 18, 2019, the Union requested Noah's Ark's response to its new Grievance

Procedure proposal totaling 10 sections. Noah's Ark. Jt. Ex. 27, NAP Bargaining Summary for November 18, 2019, at 2.

40. Noah's Ark responded that it would not agree to the Union's new Grievance Procedure proposal and would stay with its own proposal to keep the first two steps of the old Grievance Procedure and eliminate the arbitration provision. Jt. Ex. 27, NAP Bargaining Summary for November 18, 2019, at 2.

41. The Union asked why Noah's Ark was proposing to keep only the first two steps of the previous Grievance Procedure and remove the arbitration provision. Jt. Ex. 27, NAP Bargaining Summary for November 18, 2019, at 2.

42. The Union stated that if there was no arbitration provision, there could be no language in the agreement prohibiting strikes. Jt. Ex. 27, NAP Bargaining Summary for November 18, 2019, at 2.

43. However, the Union also stated that there was no language in the previous agreement prohibiting strikes, making even the Union's proposed reason for why Noah's Ark would want to keep the arbitration provision something that would need to be bargained over. Jt. Ex. 27, NAP Bargaining Summary for November 18, 2019, at 2.

44. Noah's Ark responded to the Union's question regarding its proposed modified Grievance Procedure by explaining that it would still allow the Parties to go to state court to resolve any grievances. Jt. Ex. 27, NAP Bargaining Summary for November 18, 2019, at 2.

45. During the second bargaining session after Judge Gerrard's November 1st Order, the Parties made several offers and counteroffers to each other, but ultimately no new proposals were agreed upon in their original or their proposed, modified forms. Jt. Ex. 27, NAP Bargaining Summary for November 18, 2019, at 2-3.

46. During the third bargaining session after Judge Gerrard's November 1st Order, the Union stated that it could not agree to Noah's Ark's third proposal because it was required to have arbitration in the contract. Jt. Ex. 28, NAP Bargaining Summary for November 26, 2019, at 1-2.

47. According to the Union, not having arbitration in the Parties' bargaining agreement was a deal breaker. Jt. Ex. 28, NAP Bargaining Summary for November 26, 2019, at 2.

48. Noah's Ark explained that it opposed the arbitration provision in part because it was previously unable to get arbitrators assigned from Nebraska or adjoining states, noting that the Parties' last arbitrator had been from Texas. Jt. Ex. 28, NAP Bargaining Summary for November 26, 2019, at 1-2.

49. During this bargaining session, the Union stated that its biggest sticking point was the Grievance Procedure and the Union needing arbitration in the bargaining agreement. Jt. Ex. 28, NAP Bargaining Summary for November 26, 2019, at 2.

50. The Union proposed rewriting the Grievance Procedure to shorten the process, require regional arbitration panels, and that the loser of arbitration would be required to pay the arbitrator. Jt. Ex. 28, NAP Bargaining Summary for November 26, 2019, at 2.

51. Then, the Union proposed having a federal mediator assist in the negotiations. Jt. Ex. 28, NAP Bargaining Summary for November 26, 2019, at 2.

52. Noah's Ark rejected the Union's proposal to keep arbitration in the Grievance Procedure as well as bringing in a federal mediator at that time. Jt. Ex. 28, NAP Bargaining Summary for November 26, 2019, at 2.

53. The Union brought up its proposal to keep the arbitration provision in the Grievance Procedure one more time, as well as its proposal to bring in a federal mediator, both of which Noah's Ark denied. Jt. Ex. 28, NAP Bargaining Summary for November 26, 2019, at 3.

54. After this bargaining session, the Parties agreed to have a federal mediator conduct some of their bargaining sessions in the future. Jt. Ex. 29, NAP Bargaining Summary for December 9, 2019, at 1.

55. On December 9, 2019, the Parties had their fourth bargaining session after Judge Gerrard's November 1st Order, which was conducted by Commissioner Ron Morrison from the U.S. Federal Mediation and Conciliation Service ("Morrison"). Jt. Ex. 29, NAP Bargaining Summary for December 9, 2019, at 1.

56. During the bargaining session, Noah's Ark went through the previous bargaining agreement and noted that the Parties had reached tentative agreements regarding Articles 1, 5, 11, 15, 16, and 22 out of 24 Articles. Jt. Ex. 29, NAP Bargaining Summary for December 9, 2019, at 3-4.

57. The Parties reached a tentative agreement on Article 3 during this session. Jt. Ex. 29, NAP Bargaining Summary for December 9, 2019, at 4.

58. The Parties again attempted to bargain over the Grievance Procedure, with the Union agreeing to delete Steps 3 and 4, while keeping the arbitration provision providing that the arbitration panel would be regional, and adding 15 days to Step 2. Jt. Ex. 29, NAP Bargaining Summary for December 9, 2019, at 4.

59. Noah's Ark stated that it would agree to include an appeal to court instead of to an arbitrator after Step 2. Jt. Ex. 29, NAP Bargaining Summary for December 9, 2019, at 4.

60. The Parties reached no further agreement on the Grievance Procedure during this mediator-led bargaining session. Jt. Ex. 29, NAP Bargaining Summary for December 9, 2019, at 4.

61. The next day, the Parties engaged in another bargaining session led by Morrison. Jt. Ex. 30, NAP Bargaining Summary for December 10, 2019, at 1.

62. During this bargaining session, the Parties tentatively agreed that the Union would withdraw its 23rd proposal if Noah's Ark would agree to its 24th proposal. Jt. Ex. 30, NAP Bargaining Summary for December 10, 2019, at 2.

63. Thus, a tentative agreement was reached between the Parties regarding Article 18. Jt. Ex. 30, NAP Bargaining Summary for December 10, 2019, at 2.

64. At this bargaining session, the Parties signed off on seven tentative agreements and agreed that they were in tentative agreement on three more Articles with respect to Articles 16, 20 (aside from section 6), and 22. Jt. Ex. 30, NAP Bargaining Summary for December 10, 2019, at 3-4.

65. This concluded the Parties' fifth bargaining session and second and final bargaining session led by Morrison. Jt. Ex. 30, NAP Bargaining Summary for December 10, 2019, at 4.

66. During the Parties' sixth bargaining session after Judge Gerrard's November 1st Order, they tentatively agreed to Union Proposals 2 and 3. Jt. Ex. 31, NAP Bargaining Summary for December 17, 2019, at 3.

67. The Parties also agreed that the "Witnesseth" paragraph at the beginning of the previous bargaining agreement could remain in place unchanged. Jt. Ex. 31, NAP Bargaining Summary for December 17, 2019, at 3.

68. The Parties reached a tentative agreement with respect to Article 17. Jt. Ex. 31, NAP Bargaining Summary for December 17, 2019, at 3.

69. The Parties agreed to change the language in section 6 of Article 20 from 3 employees to 1 employee. Jt. Ex. 31, NAP Bargaining Summary for December 17, 2019, at 3.

70. Noah's Ark agreed to the Union's proposal to keep only the first sentence in Article 22. Jt. Ex. 31, NAP Bargaining Summary for December 17, 2019, at 3.

71. In this second-to-last bargaining session after Judge Gerrard's November 1st Order, the Parties reached tentative agreements on Articles 20 and 22. Jt. Ex. 31, NAP Bargaining Summary for December 17, 2019, at 3.

72. During the last relevant bargaining session, on January 13, 2020, the Parties reached a tentative agreement on Article 7 relating to holidays. Jt. Ex. 32, NAP Bargaining Summary for January 13, 2020, at 2.

73. The Parties also tentatively agreed to Union proposals 2, 3, 18, and 19, and the Union withdrew Union proposals 4 and 5. Jt. Ex. 32, NAP Bargaining Summary for January 13, 2020, at 4.

74. At the end of the Parties' final bargaining session after Judge Gerrard's November 1st Order, Noah's Ark presented the Union with its final offer. Jt. Ex. 32, NAP Bargaining Summary for January 13, 2020, at 5.

75. The Union reviewed Noah's Ark's final offer and stated that there would be no need for the Parties to meet the next day. Jt. Ex. 32, NAP Bargaining Summary for January 13, 2020, at 2.

76. To this day, the Union has failed to offer any further counteroffers or identify any areas not already bargained over by the Parties where it had room left to negotiate.

77. While the Union has stated that the Parties did not bargain over "economic issues," meaning rates of pay for bargaining unit employees, Noah's Ark's final offer included the same pay rate schedule previously presented to the Union. Jt. Ex. 32, NAP Bargaining Summary for January 13, 2020, at 5.

78. The Union has similarly failed to provide any counteroffer to Noah's Ark's previously presented pay rate schedule or notify Noah's Ark that there is any room to bargain with regards to the pay rate schedule. Jt. Ex. 32, NAP Bargaining Summary for January 13, 2020, at 2.

79. Further, the Union stated during the Parties' hearing that it was its policy not to bargain over pay rate schedules until the Parties had come to an agreement on all "noneconomic issues." Hearing Testimony of Brian Schwisow; Hearing Testimony of Rodney Brejcha.

80. After being presented with Noah's Ark's final offer, the Union never made any counteroffers or notified Noah's Ark of any areas where the Union still had room to bargain that would have even allowed the Parties to engage in bargaining over the "economic issues" as defined by the Union per the Union's own standard negotiating procedures.

81. While there is some disagreement regarding who stated that the Parties did not need to meet on January 14, 2020, it should be noted that the Union never objected to Noah's Ark's summary of the January 13, 2020, negotiation until Rodney Brejcha's testimony. Hearing Testimony of Rodney Brejcha.

STATEMENT OF THE LAW

Section 8(a)(5) of the National Labor Relations Act prohibits an employer from "refus[ing] to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). The obligation to "bargain collectively" requires "the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to . . . the negotiation of an agreement," but it "does not compel either party to agree to a proposal or require the making of a concession." *Id.* § 158(d). The bargaining obligation is suspended temporarily when the parties reach a lawful impasse. *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 232 (D.C.Cir.1996). A lawful impasse "occurs when 'good faith negotiations have exhausted the prospects of

concluding an agreement.” *TruServ Corp. v. NLRB*, 254 F.3d 1105, 1114 (D.C.Cir.2001) (quoting *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967)). In other words, impasse exists if the parties “are warranted in assuming that further bargaining would be futile.” *Id.* (quoting *Wycoff Steel, Inc.*, 303 NLRB 517, 523 (1991)) (internal quotations omitted). A violation of section 8(a)(5) results in a derivative violation of section 8(a)(1), which makes it unlawful for an employer “to interfere with . . . employees in the exercise of” their section 7 rights. 29 U.S.C. § 158(a)(1); *see id.* § 157; *Wayneview Care Center v. NLRB*, 664 F.3d 341, 347 n. 1 (D.C. Cir. 2011).

ARGUMENT

After Judge Gerrard’s November 1st Order, the Parties held seven bargaining sessions from November 11, 2019, until January 13, 2020. Jt. Ex. 33, Stipulated Timeline. After the January 13, 2020 bargaining session, the Parties had reached tentative agreements on several Articles from the Parties’ previous bargaining agreement. Jt. Ex. 32, NAP Bargaining Summary for January 13, 2020, at 2-5. However, the Parties had been unable to reach an agreement regarding Article 4, the Grievance Procedure, even though it came up in at least five of the seven bargaining sessions. *See* Jt. Exs. 26-29, 32.

Brian Schwisow (“Schwisow”) admitted to the importance of the arbitration provision to the Union at the hearing. Hearing Testimony of Brian Schwisow. Eric Reeder (“Reeder”), the Union’s lead negotiator who was present at all but the last two bargaining sessions, noted that the Parties were stuck on the arbitration provision. Hearing Testimony of Eric Reeder. Reeder also admitted that the Union was not without recourse if the arbitration provision was removed from the Parties’ bargaining agreement because he understood that the Parties would have still been able to resolve grievances via a court or the National Labor Relations Board, avenues which the Union

has notably had a great amount of success with in the last two years. Hearing Testimony of Eric Reeder. Regardless, Reeder still testified that inclusion of the arbitration was a dealbreaker for the Union, and that he was not aware of any contract with his Union without an arbitration provision. Hearing Testimony of Eric Reeder.

However, to date, the Union has been unable to show how it is harmed by the exclusion of the arbitration provision, or how its proposal to have the “loser” of arbitration was even a proposal that came close to addressing Noah’s Ark’s position that the parties could be better served, and more reliably and consistently served, by addressing their grievances before a court or the NLRB rather than before an arbitrator. Additionally, the Union has produced no evidence that it had any further room to negotiate with respect to the arbitration provision or that it ever even seriously discussed removing the provision from the Parties’ bargaining agreement and the effect the provision’s removal would have. In fact, the Union’s testimony at the hearing demonstrated that the Union never attempted to see whether it could agree to removing the arbitration provision solely on the basis that it was not aware of any Union contracts that did not contain an arbitration provision. Hearing Testimony of Eric Reeder. While Noah’s Ark was able to provide a justification for removing the arbitration provision, the Union has ultimately been unable to identify why it wants the provision included, other than the fact that inclusion of such provisions is consistent with the Union’s general practices, and without any investigation into why they are generally included in Union contracts to begin with. Hearing Testimony of Eric Reeder.

It is irrefutable that the Parties were at a dead-end with respect to their negotiations concerning inclusion/exclusion of the arbitration provision. Further, “[i]mpasse on a single critical issue can create an impasse on the entire agreement.” *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 21 (D.C. Cir. 2012) (citing *CalMat Co.*, 331 NLRB 1084, 1097 (2000)).

I. AN IMPASSE EXISTED WITH RESPECT TO THE ARBITRATION PROVISION.

“A party asserting impasse based on a single issue must show that: first, a good-faith bargaining impasse actually existed; second, the single issue involved was critical; and third, ‘the impasse on this critical issue led to a breakdown in the overall negotiations.’ *Id.* (quoting *Calmat Co.*, 331 NLRB at 1097).

In *Erie Brush & Manufacturing Corp. v. NLRB*, the D.C. Circuit Court of Appeals was presented with a case markedly similar to the one at hand. In *Erie*, the NLRB had previously found that the Respondent had failed to establish the existence of a good-faith bargaining impasse because when the Union suggested that the parties should engage in further mediation, it showed that the Union did not believe further bargaining would be futile. *Id.* The NLRB took the Union’s proposal for further mediation as evidence that the Union’s positions on union security and arbitration, to which the parties had been unable to agree, were gradually softening. *Id.* The D.C. Circuit Court reversed the NLRB’s finding, however, because it was unsupported by substantial evidence. *Id.*

The court explained that “[c]onsiderations bearing on the existence of an impasse include the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations.” *Id.* (quoting *TruServ Corp. v. NLRB*, 254 F.3d 1105, 1114 (D.C. Cir. 2001) (quoting *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967) (internal quotations omitted)).

In considering whether the Union’s proposal for further negotiation showed any indication that the parties were not actually at impasse, the court stated that “a vague request by one party for additional meetings, if unaccompanied by an indication of the areas in which that party foresees

future concessions, is . . . insufficient to defeat an impasse where the other party has clearly announced that its position is final.” *Id.* at 22 (quoting *TruServ*, 254 F.3d at 1117). The court explained that the “mere invocation of mediation does not somehow magically ward off a deadlock.” *Id.* (internal quotations omitted). As the court correctly concluded, “a negotiating agent’s bare promise to continue discussing with his principal the topics of negotiations does not imply any moderation in the party’s position.” *Id.*

A. A GOOD-FAITH BARGAINING IMPASSE EXISTED BETWEEN THE PARTIES.

Similar to the facts in *Erie*, Zarate has attempted to persuade Pigsley and Noah’s Ark into further mediator-led negotiation sessions without any indication of the areas in which the Union foresaw future concessions. Additionally, Reeder’s testimony showed that the Union viewed the inclusion of the arbitration provision to be a dealbreaker on their part, making it a critical issue. Hearing Testimony of Eric Reeder. Because the Union has ultimately failed to show what, if any, issues it foresaw future concessions on during mediator-led bargaining sessions, and the Union’s testimony that the arbitration provision was a dealbreaker, there should be no question that a good-faith impasse existed. As the *Erie* court correctly noted, “the mere invocation of mediation does not somehow magically ward off a deadlock.” *Id.* Without any actual showing that further bargaining sessions would not been futile, the Union cannot demonstrate that the Parties were not at a good-faith bargaining impasse.

The parties in *Erie* had similarly stated that they considered one issue, union security, to be a “make or break” issue, or a dealbreaker as the Parties have called arbitration in this case. *Id.* at 23. The issue had pervaded the parties’ negotiations and the parties’ positions on the issue never substantially changed. *Id.* Similar to *Erie*, the Parties’ positions regarding arbitration did not

substantially change throughout the course of the relevant negotiations. *See* Jt. Exs. 26-29, 32; Hearing Testimony of Eric Reeder.

In *Erie*, the D.C. Circuit Court overruled the NLRB's claim that one of the parties would change their position on union security because it was not based on evidence in the record, but rather, the NLRB's intuitive belief that, upon further bargaining, the parties would have made additional concessions. *Erie*, 700 F.3d at 23. As the court noted, "[s]uch rank speculation cannot form the basis of a sound administrative finding, for we have emphasized that 'each party, not the Board, determines at what point it ceases to be willing to compromise.'" *Id.* (quoting *TruServ*, 254 F.3d at 1116). To the extent it is relevant, *Erie* demonstrates that the NLRB may not base its findings on an intuitive belief that the Parties positions on arbitration would have been subject to further concessions.

1. *The Relevant Bargaining Period Between the Parties Does Not Demonstrate that Noah's Ark Bargained in Bad Faith After Judge Gerrard's November 1st Order.*

Judge Gerrard's previous Contempt Order found several issues in how Noah's Ark handled bargaining with the Union previously. Jt. Ex. 9, Contempt Order Dated October 17, 2019. Notably, Noah's Ark had proposed negotiations at the same time as the Union had its officer nominations. Jt. Ex. 9, Contempt Order Dated October 17, 2019, at 4. This conflict was something that Judge Gerrard noted Noah's Ark was likely aware of, as the dates had been posted at Noah's Ark's facility at the Union's request. Jt. Ex. 9, Contempt Order Dated October 17, 2019, at 4. Judge Gerrard previously found that Noah's Ark had continued this pattern in the Parties' earlier negotiations, as well as failing to timely respond to negotiation requests by the Union. Jt. Ex. 9, Contempt Order Dated October 17, 2019, at 4. Judge Gerrard also found Noah's Ark's failing to

timely provide requested information and engaging in “surface bargaining” to be contemptible. Jt. Ex. 9, Contempt Order Dated October 17, 2019, at 8-10.

The record demonstrates that Noah’s Ark has attempted to remedy its past practices and bargain in good faith with the Union since Judge Gerrard’s November 1st Order. For starters, Pigsley has been Noah’s Ark’s main representative rather than Fischel Ziegelheim. *See* Jt. Exs. 26-32. Pigsley has attempted to meet and confer in good faith and at reasonable times with the Union. To the extent that Pigsley requested some bargaining sessions be moved to times later in the day, Pigsley did not do so to avoid the negotiations altogether as was the Union’s earlier practice, but rather for the convenience of Noah’s Ark and its business needs. Jt. Exs. 16-18. Relevantly, the Parties came to tentative agreements concerning several of their proposals and the Articles contained in the previous bargaining agreement, and Noah’s Ark and the Union participated together in two bargaining sessions led by Morrison, a federal mediator. Jt. Exs. 29-30. Additionally, before offering Noah’s Ark’s final offer, Pigsley went through every single Article in the previous agreement for discussion to ensure that the Parties were on the same page and that no further tentative agreements could be reached. Jt. Ex. 32. When Pigsley presented Rodney Brejcha with Noah’s Ark’s final offer, the Parties had already discussed the inclusion/exclusion of the arbitration provision in at least five of their seven bargaining sessions after Judge Gerrard’s November 1st Order, and the Union had specifically stated that the exclusion of the provision was a dealbreaker for it. Jt. Exs. 26-29, 32.

While the Union has taken issue with Noah’s Ark’s declared impasse, it has ultimately failed to identify any areas where further bargaining would not have been futile and has utterly failed to respond to Noah’s Ark’s final offer at all. Since the Union declared that the arbitration provision was a dealbreaker and the Parties have been unwilling to budge on this provision, Noah’s

Ark was warranted in assuming that further bargaining between the Parties would have been futile. Additionally, while the Union makes issue out of the fact that the Parties never bargained over Union-defined “economic terms,” the Union has already stated that it was its policy not to bargain over economic terms until an agreement had been reached on all noneconomic terms, an agreement the Union has admitted would have been impossible without an agreement regarding the arbitration provision.

So, to the extent that Union argues that the Noah’s Ark’s failure to bargain over mandatory economic terms was a failure to bargain in good faith, the facts demonstrate that without the Parties ever agreeing on the inclusion/exclusion of the arbitration provision, there could be no bargaining over mandatory economic terms, making the Union’s argument otherwise nothing more than a red herring. As the court noted in *Erie*, the correctness of the idea that impasse cannot be found if the parties have not negotiated over economic issues has been cast into serious doubt, especially since the NLRB expressly refused to rest its decision on that proposition in the earlier *Erie* proceeding. *Erie*, 700 F.3d at 23.

B. THE ARBITRATION PROVISION WAS A CRITICAL ISSUE FOR BOTH PARTIES.

Both the Union and Noah’s Ark admitted to the importance of the arbitration provision in any final agreement between the Parties, with the Union admitting that inclusion of the arbitration provision was a dealbreaker for it. Hearing Testimony of Eric Reeder. The Parties discussed the arbitration in at least five of their seven bargaining sessions after Judge Gerrard’s November 1st Order, and neither party showed any indication that any further concessions on the issue were forthcoming. Similar to the facts in *Erie*, bargaining over the arbitration provision pervaded the Parties’ negotiation, making any ultimate agreement impossible without the Parties first reaching

an agreement concerning arbitration. All the evidence, including the Union's own testimony at the hearing, indicates that arbitration was a critical issue for the Parties.

C. IMPASSE ON THE ARBITRATION PROVISION LED TO A BREAKDOWN IN THE PARTIES' OVERALL NEGOTIATIONS.

Similar to *Erie*, the Parties' inability to agree on whether or not to include an arbitration provision destroyed any opportunity of reaching a collective bargaining agreement. The Union admitted arbitration was a dealbreaker, and it was similarly a dealbreaker for Noah's Ark. It pervaded the Parties' negotiations and the Parties' positions never changed enough to allow for an agreement to be reached. It came up in five of the Parties' seven bargaining sessions after Judge Gerrard's November 1st Order, including one of the sessions led by Morrison. Even with the assistance of a federal mediator, no substantial progress was made on arbitration. The Parties' irreconcilable positions on arbitration made it so that no bargaining agreement was possible, as neither was willing to budge on the issue, leading to an overall breakdown in the Parties' negotiations.

CONCLUSION

Just as the court did in *Erie*, the ALJ should find that the Parties were at a lawful impasse on the critical issue of arbitration from January 13, 2020, through the end of the Parties' relevant communications, and that, as such, Noah's Ark did not unlawfully refuse to bargain with the Union in violation of sections 8(1)(1) and (5) of the National Labor Relations Act.

Respectfully submitted,

DATED: February 12, 2021.

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